IN THE

Supreme Court of the United States

No. 76-1728

OCTOBER TERM, 1976

STANLEY KOWALIK,

Petitioner,

-against-

GENERAL MARINE TRANSPORT, THE SAM BERMAN, THE JANE FRANK, THE PAMELA, THE ANNIE B., THE EVELYN, THE JARED S., THE JONATHAN B. and THE ALAN MARTIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
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STANLEY KOWALIK,

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GENERAL MARINE TRANSPORT, THE SAM BERMAN, THE JANE FRANK, THE PAMELA, THE ANNIE B., THE EVELYN, THE JARED S., THE JONATHAN B. and THE ALAN MARTIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed in this action on February 14, 1977.

JURISDICTION

The jurisdiction of this Court to issue the Writ is found at 28 U.S.C. §1254(1).

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A is reported at ——F.2d——.* The opinion of the District Court is reported at 411 F.Supp. 1328 and is

*Not yet officially reported.

printed in the joint appendix below, (40a-46a). A petition for rehearing of the determination of the Court of Appeals and suggestion that the appeal be reheard *en banc* was denied without opinion on April 22, 1977 (Appendices B & C).

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals conflict with the decision of this Court in *Arguelles v. U.S. Bulk Carriers*, 400 U.S. 351 holding that the Labor Relations Act of 1947, providing for grievance and arbitration procedure, does not displace the role served by the Federal Courts since 1790?

2. Has the plaintiff seaman employed in "coastal" service been improperly denied access to the district court in his suit for wages, and of his maritime lien therefor?

STATUTES CONCERNED

The following statutes and rules have been referred to in the lower courts and are printed at length in Appendix D hereof:

9 U.S.C. 1
46 U.S.C. 544;
46 U.S.C. 596;
46 U.S.C. 600;
46 U.S.C. 601;
46 U.S.C. 604;
Rules of Civil Procedure for the United States District Courts;
Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(1)(a), and C(3).

STATEMENT OF THE CASE

The complaint alleges, and it has not to the present time been disputed, that the plaintiff was employed by the

defendant General Marine Transport Corp. That during his employment by the defendant he served aboard various vessels one of which, the SAM BERMAN, was arrested *in rem*.

The complaint alleged that the Marine Towing and Transportation Employers' Association and a certain Local 333, United Marine Division of the National Maritime Union, had entered into a contract, of which the plaintiff was a third party beneficiary, providing for stated wages and overtime for work on vessels of the "Employer" including the defendant, and that there was due and unpaid to the plaintiff for overtime pay earned aboard the SAM BERMAN, $15,624.10.

As in the case of *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, the collective agreement herein provided almost identical grievance and arbitration procedures for disputed claims. As in *Arguelles*, those procedures were not pursued by the seaman, but instead he sued in the Federal Court, arresting the vessel *in rem* and alleging his claim *in personam* against the employer. Subsequent to the arrest, the corporate defendant appeared by counsel and moved to vacate the warrant of arrest. Pursuant to an order of the court, a bond was posted reciting the "in personam liability of the General Marine Transport Corp." (as distinguished from the *in rem* liability of the vessel) and reciting "attachment" by the "sheriff of the County of New York" rather than by the "Marshall" for the Southern District of New York, as was in fact the case.

On motion for summary judgment the district judge held that the decision of this court in *U.S. Bulk Carriers, Inc. v. Arguelles, supra*, did not displace §301 of the Labor Management Relations Act (admitting that the question was a close one); that by virtue of 46 U.S.C.A. 544 the holding of this Court in *Arguelles* was inapplicable, and that plaintiff's claim, that he was being deprived of his

maritime "lien, . . . would arise only if and when plaintiff can establish in a permissible forum that wages are owed to him." Finally in answer to the argument that pursuant to the provisions of 9 U.S.C. §3, if arbitration were the remedy, that the complaint should not be dismissed but only stayed, the judge nonetheless dismissed.

Recognizing that the plaintiff did not ground his claim on the provisions of 46 U.S.C.A. 596,* the Court of Appeals did not hold that 46 U.S.C.A. 544 excluded the plaintiff from application to the district court. It recognized that the plaintiff based his claim on "the seaman's traditional right to sue for his wages in the Federal court" as a right deriving from Article III of the Constitution; in short the traditional right of seamen since 1790 to have access to the Federal courts, but the Court of Appeals nonetheless affirmed the dismissal below.

Again, disputing by implication a myriad of similar cases, (see cases cited on page 5) wherein similar seamen were permitted to sue *in rem*, the Court of Appeals held that since the plaintiff's right stemmed from the Union contract, that he should be bound by its other provisions, and again, in a concept of the maritime lien, to say the least revolutionary, affirmed that there could be no maritime lien grounding the arrest *in rem* until the plaintiff established "in a permissible forum that wages are owed to him."

Judge Mansfield, in a strong dissenting opinion, stated that a

*The district court, mistakenly stating that the plaintiff grounded his claim under 46 U.S.C. 596, held that 544 precluded application of 596 to a "coastal seaman" and thus distinguished *Arguelles*, Section 544 (Enacted in 1874 [18 Stat. 64]) did exclude coastal seamen from the provisions of 596, but in 1898 (30 Stat. 756) restored to seamen "making coastwise voyages" the benefits of 596 and in the La Follette Act of 1915, 596 was again re-enacted expressly including in its provisions applicability to seamen aboard vessels "making coastal voyages."

> ". . . seaman still has a time honored right to obtain a maritime lien to secure his wage claims, which dates back to the Act of July 20, 1790, Ch. 29, §6, 1 Stat. 133, currently expressed in 46 U.S.C. §603-604. Nothing in the collective bargaining agreement with Kowalik's employer waives or modifies this right."

Further, evincing better understanding of the maritime lien, Judge Mansfield stated that in his opinion the seaman should have the right to perfect his maritime lien *ab initio* "just as an Arguelles seaman would have the right to do" regardless of whether the seaman were required to proceed by arbitration or otherwise.

REASONS FOR GRANTING THE WRIT

The decision of the lower court, it is most respectfully submitted, has decided a federal admiralty matter, both in conflict with applicable decisions of this Court and of other courts. Thus, the holding that the collective bargaining agreement precludes application to the district court for relief is, in direct conflict with the holding of this Court in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 315, with respect to the applicability of the Labor Relations Management Act to the claims of seamen.

So too, the newly found distinction between "coastal or coastwise" seamen and deep sea seamen is at severe odds with otherwise established jurisprudence. Thus, see *Saylor v. Taylor* (Ca. 4) 77 F. 476, 478 with respect to a dredge; *Swift v. Knowles* (Ca. 5) 100 F.2d 977 a motorboat; *Butler v. Ellis* (Ca. 4) 45 F.2d 951, a steamdredge; *The Chester* (D.C., Md.) 25 F.2d 908, 910; *The Dola Lawson*, 31 F.2d [illegible]0 affirmed sub nom *Collie v. Ferguson*, 281 U.S. 55 a "powerboat licensed for coastwise trade;" *The Ark*, 17 F.2d 446, a houseboat; *The American Bank Trust*

Company, 206 F.Supp. 444, a "harbor vessel rigged for sand blasting." And see also the scholarly and well considered opinion of Judge Goodman in *Gayner v. The New Orleans*, 54 F. Supp. 25, 27 a harbor-ferry boat, wherein Judge Goodman held that the local seamen were entitled to a maritime lien of which they could not legally be divested, regardless of a collective agreement containing arbitration and grievance procedures. Certainly a Court of Appeals decision that would unsettle so much established jurisprudence is worthy of this Court's consideration. It is not presumptuous to suggest, that the decision below so far departs from the accepted and usual course of judicial proceedings and so far sanctioned departure by the Court of Appeals, as to call for this Court's exercise of its power of supervision.

The decision of the Court of Appeals in stating

> "But the preservations of a [maritime] lien on the Sam Berman can only be justiifed by a foundation therefor. As the District Court said: 'If this could be a case for a lien, it would arise only if and when plaintiff can establish, in a permissible forum, that wages are owed to him'."

completely misunderstands the nature of the maritime lien. Not only does it unsettle settled law, as it relates to seamen generally, but as the maritime lien relates to other maritime lien claims of salvage, torts, charter relations, etc. This statement, which would prevent the operation of the lien until judgment has been obtained, completely misconceives the nature of the maritime lien. Thus, as the court stated in *Thyssen v. Federal Commerce and Navigation Co.*, 274 F.Supp. 18 at page 21:

> "Process in rem and of maritime attachment represents an exception to the general rule that in the absence of statutory authorization, a plaintiff may not have security for his claim until it is established and reduced to judgment."

See also Benedict on Admiralty, 7th Ed. §22; The Admiralty and Maritime Supplemental Rules, C (1) (a) and (3); *The Resolute*, 168 U.S. 437, 440.

Additionally relevant are 46 U.S.C. 600 and 601 which expressly forbid exactly what the lower courts have affirmed herein.

Nor did the lower courts acknowledge or refer to the provisions of 9 U.S.C.A. §§1 and 3 which for the first time made contracts to arbitrate enforcible in the Federal Courts. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984; *Petition of Pahlberg*, 43 F.Supp. 761. Section 1 expressly excludes from enforceability contracts with respect to seamen, the said law expressly providing:

> ". . . but nothing herein contained shall apply to contracts of employment of seamen. . . ."

Certainly, a decision which so grossly unsettles so long and firmly established jurisprudence and conflicts with decisional law of this Court and circuit decisions, and additionally with statutes intended for the special protection of a class of people deemed to be the wards of the court, is worthy of review by this Court.

Respectfully submitted,

LEBOVICI & SAFIR
Attorneys for Petitioner

HERBERT LEBOVICI
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 151—September Term, 1976.
(Argued November 5, 1976 Decided February 14, 1977.)
Docket No. 76-7227

STANLEY KOWALIK,
Plaintiff-Appellant.

-against-

GENERAL MARINE TRANSPORT CORP., THE SAM BERMAN, THE JANE FRANK, THE PAMELA, THE ANNIE B., THE EVELYN, THE JARED S., THE JONATHAN B. and THE ALAN MARTIN,
Defendants-Appellees.

Before: MOORE, MANSFIELD, and MESKILL,
Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York, Honorable Marvin E. Frankel, *Judge*, dismissing plaintiff-appellant's complaint in his action for overtime wages and releasing the bond posted by defendant-appellee to discharge the attachment of its vessel obtained by plaintiff-appellant.

Affirmed.

Herbert Lebovici, Esq., New York, New York (Lebovici & Safir, of counsel), *for Plaintiff-Appellant.*

Jared Stamwell, Esq., New York, New York, *for Defendants-Appellees.*

MOORE, *Circuit Judge:*

Plaintiff, Stanley Kowalik, appeals from a judgment, granted in favor of defendants upon their motion for summary judgment (1) dismissing the complaint in an action for overtime wages and (2) releasing the bond posted by defendant General Marine Transport Corp. ("GMT") to discharge an attachment of the vessel SAM BERMAN obtained by plaintiff in said action.

In view of the dismissal of the complaint and to avoid a discussion of irrelevant generalities, it is incumbent upon us to examine plaintiff's specific allegations. Plaintiff alleges that on or about April 1, 1970, Marine Towing and Transportation Employers Association ("Employer"), on behalf of the defendant GMT, and others, and Local 333, United Marine Division, National Maritime Union (the "Union") "entered into a contract [the "Agreement"] of which the plaintiff was a third party beneficiary, providing for the payment of stated wages and overtime for work on vessels of the 'Employer' including the defendant"; that the contract (with one renewal) continued in effect until March 31, 1976; that the contracts provided for overtime from February 1, 1970 to April 1, 1975 at rates varying from $2.68 to $3.72; that plaintiff worked overtime "as defined in the contract" but only received straight time pay; that he worked on eight different vessels during this period; and that there is due and owing to him a total of $22,352.12.[1]

It is clear from the face of the complaint that plaintiff's claim derives from the Agreement between the Employer and the Union. The Agreement does not come to light except as attached to an affidavit of GMT's president and as referred to in the parties' statements of fact. Thus, plaintiff states (Pltf's. Br., p. 2) that his "employment was covered by a collective agreement (Exhibit A) fixing the

1. The complaint sets out alleged overtime rates specified in the Agreement from February 1, 1970 to April 1, 1975 and the totals claimed to have been unpaid on eight vessels on which plaintiff worked during that period.

rates of pay to be paid for regular and overtime work . . . ." Plaintiff concedes that the "agreements fixing the rates of pay" provide for "adjustment of grievances and arbitration of such disputes not settled by agreement . . ." (Pltf's Br., p. 3). Adjustment and Grievance Committees were specified and in the event of the failure to settle the controversy, arbitration procedures were provided.

Plaintiff, making no effort to comply with the terms of the Agreement, upon which he bases his overtime claim, sought to by-pass it entirely by seeking, as he calls it, "the seaman's traditional remedy in the District Court", namely, a suit *in personam* against GMT and a suit *in rem* against the SAM BERMAN.

On the motion for summary judgment the District Court found that "[t]here are no material issues of fact."[2] 411 F.Supp. 1325, 1326 (S.D.N.Y. 1976) but it had to cope with several legal problems, such as, where the complaint discloses the agreement allegedly giving rise to the wage claim, does failure to allege submission of such claim to the grievance and arbitration procedures constitute a failure to state a claim and, must plaintiff allege a failure by his union adequately to represent him to give him standing in the courts? Furthermore, the effect of the Supreme Court's decision in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971) had to be considered.

The District Court recognized that the question of whether the "method of collecting seamen's wages contained in 46 U.S.C. §596[3] has been displaced by §301 of

2. This may be true as to jurisdictional questions; there would appear to be several factual issues as to the merits of the wage claim.

3. 46 U.S.C. §596 provides, in pertinent part

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; . . . and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third

the Labor Management Relations Act . . ." had been answered in the negative by *Arguelles, supra,* at 352 and 357, but believed that *Arguelles* was not applicable here, because of the exclusion by 46 U.S.C. §544[4] from the provisions of §596 of vessels in coastwise trade — as was the SAM BERMAN.

Quite apart from the exclusionary provisions of §544, it is quite obvious that §596 does not apply to plaintiff's claim. Plaintiff does not allege termination of the agreement under which he was shipped. To the contrary, the Employer-Union Agreement, *i.e.*, the only basis for his claim, persisted and controlled his rights, if any, during the entire period. Until his overtime claim (and there is no allegation that any such claim was made at the end of any voyage) was made known or asserted, no master or owner could have paid or have failed to pay "within two days" any wages due. Obviously it required proceedings pursuant to the Agreement to establish the "due", if any.

Furthermore, plaintiff does not allege that he was not paid wages at the end of every voyage. The overtime claim concept apparently came into being in June 1975 as the result of an Employer-Union controversy.

Plaintiff, however, does not stake his claim upon §596. He asserts (Pltf's Br., p. 12) that: "[t]he libel nowhere asserts any rights pursuant to 596." Rather, he bases his claim on "the seaman's traditional right to sue for his wages in the Federal court" as a right deriving from Article III of the Constitution (giving jurisdiction to cases of

part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . ."

4. 46 U.S.C. §544 provides, in pertinent part, as follows:

"None of the provisions of sections . . . , 591-596, . . . of this title shall apply to sail or steam vessels engaged in the coastwise trade. . . ."

admiralty). In short, he relies upon a traditional right of seamen since 1790 to have access to the federal courts. But this status does not obtain in this case. The very concept of "wages" depends upon some agreement, expressed or implied, with respect thereto. Plaintiff here specifically delegated the Union to act on his behalf. Having done so, he should adhere to the method selected by him to determine "wages". Until that step is taken, it would seem premature to debate enforcement procedures.

The District Court considered plaintiff's contention that in any event the action should be stayed pending arbitration rather than being dismissed. The Court was troubled by the fact that "only speculation could forecast that a claim may some day come to exist" and, since that day had not come and would not come until contract procedures determined the merits, if any, of plaintiff's wage claim, decided that "[t]he fitting remedy now. . . . is dismissal." 411 F. Supp. at 1328.

Quite apart from statutes and decisions in other cases, it is important that the parties respectively receive the full benefits of their rights under the Agreement and any other rights to which they are justly entitled. Plaintiff is a member of the Union. The Union and the Employer have an Agreement respecting wages. Plaintiff asserts that he is "a third party beneficiary" of that Agreement and claims no independent relationship with the Employer. There would appear to be no just reason why plaintiff should obtain such wage benefits as the Agreement may provide but simultaneously repudiate the means specified in the Agreement for the determination thereof. Nor by the District Court's dismissal is plaintiff left without further recourse. If he follows the Agreement's directions, his overtime claim can be decided on the merits; if his Union fails in its duty, such conduct may well be actionable. But the preservation of a lien on the SAM BERMAN can only be justified by a foundation therefor. As the District Court

said: "If this could be a case for a lien, it would arise only if and when plaintiff can establish, in a permissible forum, that wages are owed to him." 411 F.Supp. at 1328. At this time, at least, this is not that forum.

Judgment affirmed. No costs.

MANSFIELD, *Circuit Judge* (Dissenting in Part):

In *U.S. Bulk Carriers, Inv. v. Arguelles*, 400 U.S. 351 (1971), the Supreme Court held that §301 of the Labor Management Relations Act, 29 U.S.C. §185, which provides for enforcement of grievance and arbitration provisions of collective-bargaining agreements, did not displace the earlier alternative method available to a seaman under 46 U.S.C. §596, which permits him to sue directly for wages due, invoking federal jurisdiction under 28 U.S.C. §1333. Thus the seaman was held to have been given an additional remedy which does not preclude his invoking the federal courts as traditional protectors of seamen's rights since 1790.

The majority agrees with Judge Frankel that *Arguelles* may be side-stepped in this case on the ground that 46 U.S.C. §544 expressly precludes a coast-wise seaman, such as the plaintiff here, from availing himself of the rights granted by §596 to trans-oceanic seamen to sue for penalty wages. Although this conclusion is in my mind far from certain, in view of the checkered legislative history of §§544 and 596, see *Gardner v. The Danzler*, 281 F.2d 719 (4th Cir. 1960), and a respectable argument may be made to the effect that coast-wise seamen have the right to invoke federal jurisdiction over a claim for wages, see *Mahar v. Gartland S.S. Co.*, 154 F.2d 621 (2d Cir. 1946), I do not believe it necessary to resolve that issue in this case. Whether or not a coast-wise seaman is relegated by §301 to exhaustion of grievance and arbitration procedures for adjudication of his wage claims in line with the policy

favoring arbitration, see *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965), he still has a time-honored right to obtain a maritime lien to secure his wage claims, which dates back to the Act of July 20, 1790, ch. 29, §6, 1 Stat. 133, currently expressed in 46 U.S.C. §§603-604.[1] Nothing in the union's

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1. Section 603 proviees:

"§603. *Summons for nonpayment*

"Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of title 53 of the Revised Statutes, or any dispute arises between the master and seamen touching wages, the district judge for the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then, any judge or justice of the peace, or any United States commissioner, may summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, her tackle, apparel, and furniture, according to the course of admiralty courts, to answer for the wages."

Section 604 provides:

"§604. *Libel for wages*

"If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or United States commissioner shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the vessel. In all cases where the matter in demand does not exceed $100 the return day of the monition or citation shall be the first day of a stated or special session of court next succeeding the third day after the service of the monition or citation, and on the return of process in open court, duly served, either party may proceed therein to proofs and hearing without other notice, and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suits all the seamen having cause of complaint of the like kind against the same vessel may be joined as complainants, and it shall be incumbent on the master to produce the contract and log book, if required to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the burden of proof of the contrary shall be on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his

collective bargaining agreement with Kowalik's employer waives or modifies this right.

A seaman claiming wages is entitled, unless the ship's master shows that the wages claimed have been "paid or otherwise satisfied or forfeited," to obtain a court order directing issuance of process against the vessel, see 46 U.S.C. §604. Otherwise the only security available for payment might sail out of the harbor beyond reach of the court's process before his claim had been reduced to an award or judgment, or the seaman might risk losing his lien by reason of subordination to other intervening creditors or the employer's bankruptcy. Rather than force the seaman to underwrite these risks, I would permit him to maintain the present action as one for enforcement of his lien to secure his wage claim and exercise the court's inherent power to stay the action pending the arbitration award. Indeed, implicit in the majority opinion is the concept that, once he had reduced his claim to an award through arbitration, he might invoke federal jurisdiction to enforce the aware and his lien rights. I believe he has the right to perfect the lien before obtaining such an arbitration award, just as an *Arguelles* seaman would have the right to do so before reducing his wage claim to judgment.

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wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the day when such wages are due, in accordance with section 596 of this title. This section shall not apply to fishing or whaling vessels or yachts."

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of April, one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE, HON. WALTER R. MANSFIELD, HON. THOMAS J. MESKILL,
Circuit Judges.

Stanley Kowalik,
Plaintiff-Appellant,

v.

General Marine Transport Corp., The Sam Berman, The Jane Frank, The Pamela, The Annie B., The Evelyn, The Jared S., The Jonathan B. and The Alan Martin,
Defendants-Appellees.

76-7227

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

[signed] A. Daniel Fusaro, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Stanley Kowalik,
Plaintiff-Appellant,

v.

General Marine Transport Corp., The Sam Berman, The Jane Frank, The Pamela, The Annie B., The Evelyn, The Jared S., The Jonathan B. and The Alan Martin,
Defendants-Appellees.

76-7227

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

[signed] Irving R. Kaufman,
Chief Judge

APPENDIX D

TITLE 9.—ARBITRATION

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670.)

§3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch. 392, 61 Stat. 670.)

TITLE 46.—SHIPPING

§544. Vessels in coastwise trade.

None of the provisions of sections 201 to 203, 542a, 545, 546, 561, 562, 564 to 571, 577, 578, 591 to 595, 600, 621 to 628, 641, 642, 644, 645, 651, 652, 662 to 669, 703 to 709, 711, 713 of this title shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage. (June 9, 1874, ch. 260, 18 Stat. 64; Mar. 3, 1911, ch. 231, §291, 36 Stat. 1167.)

§596. Time for payment.

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court;

but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. (R. S. §4529; Dec. 21, 1898, ch. 28, §§4, 26, 30 Stat. 756, 704; Mar. 4, 1915, ch. 153, §3, 38 Stat. 1164.)

§600. Agreements as to loss of lien or right to wages.

No master or seaman shall, by any agreement other than is provided by title 53 of the Revised Statutes, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of title 53 of the Revised Statutes, and every stipulation by which any master or seamen consents to abandon his right to his wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative. (R.S. 4535; Apr. 25, 1968, PUb. L. 90-293, §1(c), 82 Stat. 108.)

§601. Attachment or arrestment of wages; support of wife and minor children; State tax laws.

No wages due or accruing to any master, seaman, or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a master, seaman, or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*, That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any master or

seaman of any part of his wages for the support and maintenance of his wife and minor children; *And provided further*, That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or nontontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subidivision of any of them. (Mar. 4, 1915, ch. 153, §12, 38 Stat. 1169; Sept. 14, 1959, Pub. L. 86-263, 73 Stat. 551; Apr. 25, 1968, Pub. L. 90-293, §1(d), 82 Stat. 108.)

§601. Libel for wages.

If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice or United States commissioner shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the vessel. In all cases where the matter in demand does not exceed $100 the return day of the monition or citation shall be the first day of a stated or special session of court next succeeding the third day after the service of the monition or citation, and on the return of process in open court, duly served, either party may proceed therein to proofs and hearing without other notice, and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suits all the seamen having cuase of complaint of the like kind against the same vessel may be joined as complainants, and it shall be incumbent on the master to produce the contract and log book; if required to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the burden of proof of the contrary

shall be on the master. But nothing herein contained shall prevent any seaman from maintaining any action at common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the day when such wages are due, in accordance with section 596 of this title. This section shall not apply to fishing or whaling vessels or yachts. (R. S. §4547; May 28, 1896, ch. 252, §19, 29 Stat. 184; Dec. 21, 1898, ch. 28, §§6, 26, 30 Stat. 756, 764; Mar. 2, 1901, ch. 814, 31 Stat. 956.)

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C—Actions in Rem: Special Provisions

(1) *When Available.* An action in rem may be brought

(a) To Enforce any maritime lien.

****

(3) *Process.* Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1728

STANLEY KOWALIK,

Petitioner,

v.

GENERAL MARINE TRANSPORT CORP. and the Vessel "SAM BERMAN",

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

In this case the complaint was dismissed below upon respondents' motion for summary judgment because it failed to state a claim upon which relief could be granted. The District Court, by the Hon. Marvin E. Frankel, held that petitioner, a seaman claiming wages due under a collective bargaining agreement containing mandatory griev-

ance procedures, was required to process his claim under the grievance procedures of that agreement. *Kowalik* v. *General Marine Transport Corp.*, 411 F. Supp 1325 (S.D. N.Y. 1976). The failure either to process the claim under the grievance procedures or to allege breach by petitioner's union of its duty of fair representation meant that the complaint did not state a cause of action under established principles of labor law. 411 F. Supp. at 1328.

The Court of Appeals affirmed the judgment below. It held in *Kowalik* v. *General Marine Transport Corp.*, 550 F. 2d 770 (2d Cir. 1977), that petitioner had not established a claim upon which relief could be granted because he failed to use the grievance procedures of the collective bargaining agreement. 550 F. 2d at 772.

Petitioner's complaint claims overtime wages allegedly due for the past six years under the terms of a collective bargaining agreement between petitioner's union and respondent corporation. The agreement upon which his claim is based contains grievance and arbitration procedures applicable broadly to any grievance or dispute involving the interpretation or application of the terms of the agreement or its breach. Petitioner concedes that these grievance procedures are applicable to his claim and further admits that he made no effort to use them. 550 F. 2d at 771.

Argument

It is basic that an employee may not sue his employer for breach of contract unless grievance remedies in an applicable collective bargaining agreement have been exhausted, or resort to such remedies is futile because the union is unfaithful to its duties of representation. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965); *Vaca* v. *Sipes,* 386 U.S. 171, 183-187 (1967). The proper remedy for failure to exhaust grievance remedies is summary judgment dismissing the complaint. *Republic Steel Corp.* v. *Maddox, supra; Hubicki* v. *ACF Industries, Inc.,* 484 F. 2d 519 (3d Cir. 1973). In order to distinguish his case from the applicable principle, petitioner poses questions and arguments which misstate the reasoning and holding of *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351 (1971), and confuses the jurisdiction of a federal court with the merits of the wage claim itself.

In *Arguelles,* this Court clearly stated that its holding was a limited one, based upon the existence of the express statutory remedy for seamen created by 46 U.S.C. §596. Justice Douglas, writing for the majority, distinguished *Arguelles* from *Republic Steel Corp.* v. *Maddox, supra,* the case establishing that the use of grievance procedures is required, stating:

> "In *Maddox,* there was no express exception governing individual claims of employees from §301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by §596. The reluctance in *Maddox* to redesign the statutory regime of §301 makes us equally

reluctant to redesign the statutory regime of §596." 400 U.S. at 357.

Justice Harlan's concurring opinion further stressed the distinction between a suit on the contract and emphasized that the decision involved the enforcement of a specific statute. 400 U.S. 361-62 (Harlan, J., concurring).

Courts of Appeals faced with the question have held that the exception *Arguelles* makes in the requirements of *Maddox* is based upon the existence of an alternate statutory remedy. They have rejected the argument now made by petitioner to this Court that a broad exemption exists for seamen from federal labor law requiring the use of contract grievance procedures. *Suissa* v. *American Export Lines, Inc.*, 507 F. 2d 1343, 1346-47 (2d Cir. 1974); *Cady* v. *Twin Rivers Towing Company*, 486 F. 2d 1335, 1338 (3d Cir. 1973) ("We are unable to discern in *Arguelles* any indication that the Court intended to create for seamen a broad exception to the principle of *Maddox*, when, as here, no alternate statutory remedy is available.")

Petitioner makes no claim that his cause of action is grounded in any alternate statutory remedy to the grievance procedures required by the collective bargaining agreement. Moreover, both the Court of Appeals and the District Court held that 46 U.S.C. §596, the statute interpreted by this Court in the *Arguelles* case, did not apply to petitioner and the petition does not seek review of that judgment. Therefore, the petition does not raise any question of a conflict with the rule in *Arguelles*.

The opinions in *Arguelles* further emphasize that the decision below is correct. Although the Court was divided

in *Arguelles*, all Justices agreed that, except for the specific statute upon which the seaman in that case based his claim, resort to grievance procedures prior to initiation of a lawsuit was necessary for a seaman to state a cause of action. Thus, under the rule in *Maddox*, claims for breaches of collective bargaining agreements—by seamen or any other category of employee—must be processed under the grievance procedures of those agreements.

Petitioner's other argument that a conflict exists between the judgments below and the law regarding maritime liens is misplaced. The action was initiated *in rem* by the arrest of the vessel "Sam Berman" and the bond posted to release the vessel was returned after summary judgment was granted and the complaint dismissed. Petitioner thus obtained both access to federal court and a maritime lien to secure his claim until a decision was made on the merits. There is no basis for the assertion that the judgment deprives a seaman of access to federal courts or a right to a maritime lien.

The cases and statutes cited by petitioner regarding maritime liens relate to whether an action can be brought *in rem* and are irrelevant to a decision on the merits such as the judgment below. Petitioner confuses the jurisdiction of a court with the merits of his claim. The fact that a federal court has jurisdiction over an *in rem* action by a seaman for wages does not mean that such an action can be maintained after it has been dismissed for failure to state a claim upon which relief can be granted.

As the court below states, whether a claim will someday come to exist is now speculative and depends upon pe-

titioner and his labor union taking steps to exhaust contract grievance procedures. Absent any facts or allegations to establish an existing case or controversy, the complaint was necessarily dismissed. No important question of federal law is presented thereby.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JARED STAMELL
Attorney for Respondents

July 6, 1977